

FEB 12 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DESMONE BASTIAN,

Defendant - Appellant.

No. 08-30122

D.C. No. 2:06-CR-00379-JLR

MEMORANDUM^{*}

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted February 2, 2009
Seattle, Washington

Before: B. FLETCHER, RYMER and FISHER, Circuit Judges.

Desmone Bastian appeals his conviction, and denial of a new trial, on charges that he violated 18 U.S.C. § 201(b)(2). We affirm.

Bastian's argument that the evidence was insufficient turns on his view that Sandra Maas's testimony was incredible. However, we will not overturn a jury's

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

credibility determination unless the testimony is incredible or unsubstantial on its face. *See United States v. Alvarez*, 358 F.3d 1194, 1201-02 (9th Cir. 2004). We do not think Maas's testimony was, for material parts of her testimony were corroborated. In any event, even apart from Maas's testimony, Bastian's admissions, his cell phone records, and his own conduct suffice to show intent to accept consideration for passing Maas through the border. Thus, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found corrupt intent beyond a reasonable doubt. *See United States v. Carranza*, 289 F.3d 634, 641-42 (9th Cir. 2002) (articulating standard); *United States v. Leyva*, 282 F.3d 623, 625-26 (9th Cir. 2002).

Nor did the district court abuse its discretion in denying Bastian's motion for a new trial. Fed. R. Crim. P. 33(a); *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000). Even taking Mass's credibility problems into account, the court could well conclude that the verdict was not contrary to the weight of the evidence. *See United States v. Alston*, 974 F.2d 1206, 1211-12 (9th Cir. 1992); *United States v. Steel*, 759 F.2d 706, 713-14 (9th Cir. 1985); *United States v. Chen*, 754 F.2d 817, 821-22 (9th Cir. 1985). The jury's acquittal on the marijuana importation charge does not show otherwise; acquittal on this count is not inconsistent with a guilty verdict on the bribery charge. *See United States v.*

Powell, 469 U.S. 57, 64-67 (1984); *Ferrizz v. Giurbino*, 432 F.3d 990, 992-93 (9th Cir. 2005).

AFFIRMED.